



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 64 OF 2012

HELEN ATIENO MAGUDHA.....1ST PETITIONER

PETER KIRONYO.....2ND PETITIONER

COLLINS OYOO.....3RD PETITIONER

VERSUS

THE REGISTRAR OF POLITICAL PARTIES.....RESPONDENT

JUDGMENT

1. By way of Petition dated 6th March, 2012, the Petitioners have come to this Honourable Court seeking the following declarations and orders:

i) *A declaration to issue that the Petitioner's fundamental rights and freedoms under Article 4(2), 10(a), (b),(d) 19, 20, 21, 22, 23, 24, 27, 28, 32, 33, 35, 36, 37, 38, 40, 47, and 48 and Article 50 of the Constitution of Kenya, 2010 have been and were contravened and grossly violated by the Respondent.*

ii) *Judicial Review order of mandamus compelling the Respondent to issue Madaraka People's Movement with a Provisional Certificate pending the issuance of the Full Certificate.*

iii) *Judicial review order of certiorari for quashing the Respondent's decision to deny and or refuse the use of the name "Madaraka People's Movement" for purposes of registering the Petitioners' political party.*

iv) *A declaration to issue declaring null and void any law, regulation and/or guideline found to be unconstitutional to the extent of its inconsistency with the letter and spirit of the Kenyan Constitution, 2010 purported to be relied on by the Respondents to deny, violate, infringes, suspend and/or delay re-registration of Madaraka People's Movement in the past by the Respondent.*

v) *Any further orders, directions, declarations and remedies as this Honourable Court deems fit and just in the circumstances.*

The Facts

2. According to the Affidavit filed in support of the Petition, Madaraka People's Movement(here after "MPM") is a political party with over 67,000 citizens and was first registered as a political party on 23rd September, 2006 under the name "Madaraka Party". The 1st, 2nd and 3rd Petitioners are officials of MPM in the capacities of Chairperson, National Treasurer and Deputy Treasurer, respectively. Following the enactment of the Political Parties Act, 2007, all political parties were required to register afresh in order to comply with the new Act.
3. On 26th October 2009, the Petitioners accordingly filed forms for re-registration of a political party by the name "Madaraka Party" and duly streamlined the party Constitution. That on 10th November 2009, the Petitioners presented the Constitution of Madaraka Party to the Respondent whereupon it received assurance from the Registrar that the Party's Constitution was in perfect order and that the party could present its application for re-registration.
4. However, things took a different turn when this was followed by several fruitless attempts by the Petitioners to lodge their application for re- registration of their political party. On or about 11th January 2010, the Petitioners returned to the Respondent's office to lodge the re-registration application form but they were told to wait until February, 2010 when the national voter registration exercise by the then Interim Independent Electoral(IIEC) would commence. The Petitioners were later to be informed by the Chief Executive in the office of the Respondent that a change of name of the party was necessary and the Petitioners accordingly complied, changing the new name from the hitherto '*Madaraka Party*' to the new *Madaraka People's Movement*. On March 22nd, 2010, the new name was then presented to the Respondent's office and upon search was found to be available for registration. The Respondents asked for payment of Kshs.500 as search fee and Kshs.100,000 as statutory fees for re-registration and asked the Petitioners to go back three days later to receive a letter authorizing the use of the Party's name.
5. However, this was not to yield fruits as the Petitioners were later informed by the Respondent's office that they could not use the party's name as the name "belonged" to the Chairman of the party since 2005 during the initial registration of the party and the ultimate result of the back and forth transaction is that the Petitioners have not had their party registered two years down the line and the Petitioners sought this court's intervention in the stalemate.
6. The Registrar of Political Parties("Registrar") the Respondent herein has opposed the Petition on the basis of a Replying Affidavit dated 31st July 2012, written submissions filed on 1st August, 2012 and Supplementary submissions filed on 16th November 2012.
7. It is the Registrar's deposition that the Petitioners have not complied with the provisions of the Political Parties Act, 2011 governing the registration of Political Parties and as such can't allege that their Constitutional rights have been violated. It was further stated that upon commencement of the Political Parties Act, 2007, MPM had 180 days within which to comply with the provisions of the Political Parties Act, 2007 and that it did not do this and therefore ceased to be a political party.
8. The Affidavit however lacks material particulars answering to the Petitioners' specific claims.
9. Counsel arguing the case on behalf of the Respondent submitted that no rule, law or regulation has been cited in the Petition and that none can be said to have been breached. Counsel further submitted that the remedies sought are judicial review remedies which are not set out in the Constitution and that the criteria was in common law for irregular or unprocedural conduct.

Determination

10. I must at the outset point out that although some part of the events subject of the present Petition took place prior to the promulgation of the Constitution, a large chunk of the alleged offensive transactions occurred and culminated under the new Constitutional regime and this court will not shy away from invoking and applying provisions of the Constitution of Kenya, 2010 in as far as possible. I

have also found it necessary to warn myself (and the parties before me) that this is not an inquiry as to whether or not the Petitioners' party was qualified to be registered, for there is the body that is mandated to ascertain that in the first instance and my determination will be limited to the conduct of the Respondent in order to satisfy myself whether indeed it discharged the mandate bestowed upon it in accordance with the Constitution and whether in the process of discharging its mandate, it violated the Petitioner's rights.

11. The Respondent has also alluded to the fact that the Petition ought not be entertained for want of precision in setting the specific rights claimed to have been violated. In ***Trusted Society of Human Rights Alliance v Attorney General & 2 others, Petition No. 229 of 2012***, the court stated as follows regarding the requirement of precision in setting out alleged infringements;

“[46]... However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

I adopt the above reasoning and although not the epitome of precision, I am satisfied that the pleadings have laid out the issues clearly enough for this court to get a grip of the real issues in controversy and exercise its judicial authority and adjudicate the claims and fashion appropriate relief and that the Respondent has been able to respond to these claims.

12. **Section 3** of the repealed Political Parties Act 2007 established the office of the Registrar of Political Parties responsible for “ *the registration of political parties in accordance with the provisions of this Act.* ”

Section 18 of the repealed Act provided for the conditions of registration in the following terms:

“Conditions of provisional registration

18. (1) *An association of persons or an organization shall not operate or function as a political party unless it has first been registered in accordance with the provisions of this Act.*

(2) *An application for the provisional registration of a proposed political party shall be in writing, signed by the applicant or applicants and shall—*

(a) set out the name of the party;

(b) if the party wishes to be able to use for the purposes of this Act an abbreviation of its name, set out that abbreviation;

(c) be accompanied by a copy of the constitution of the proposed party which is to comply with the provisions of section 19; and

(d) be accompanied by the prescribed fee.

(3) *An application for registration under subsection (2) shall include a request for the registration of the emblem of the party to be used on ballot papers. ”*

13. The **Section 21(1)** is clear that the Registrar is to provisionally register a political party within 30 days upon fulfillment of the prescribed conditions. It states thus;

“Upon making an application for registration of registration, a political party shall first be a political party provisionally registered and issued with a certificate party of provisional registration within thirty days on fulfilling the conditions prescribed in section 18. ”

This provision is replicated in the 2011 version of the Political Parties Act which at its **Part II** provides for the registration and regulation of political parties. **Section 5** providing for provisional registration partly states as follows;

“(1) An association of persons or organisations applying to be registered as a political party may apply to the Registrar for provisional registration.

(2) Upon application for registration under subsection (1), the Registrar shall, within thirty days of the association or organisation fulfilling the conditions prescribed in section 6, issue that association or organisation with a certificate of provisional registration.

(3) A political party that has been provisionally registered under subsection (2) shall, not later than one hundred and eighty days from the date of provisional registration, apply to the Registrar for full registration.

(4) The Registrar shall, within seven days of receipt of an application under subsection (3), publish a notice in the Gazette and in at least two newspapers having nationwide circulation, inviting objections from any person or any other political party concerning the registration of the name, symbol or colour of the party or any other issue relating to the registration of the political party. provides for two stages in registration Provisional registration which should be effected within 30 days of application and full registration 180 days.

.....”

Section 7 then goes forth to set out the conditions for full registration.

14. The Constitution of Kenya 2010, contains several provisions governing the conduct of state officers. **Article 10** for instance enjoins all State organs, state officers to abide by the national values and principles whenever any of them applies the Constitution, enacts, applies or interprets the law or makes or implements public policy decisions. Among the national values and principles are the rule of law, inclusiveness, human rights, good governance, transparency and accountability.

15. Under **Article 20** of the Constitution, the Bill of Rights applies to all law and binds all State organs and all persons. Political rights is among the rights safely guarded by our Bill of rights. Under **Article 38**, it is the right of every citizen to form and participate in forming a political party. The Article reads as follows:

“38. (1) Every citizen is free to make political choices, which

includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections

based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this

Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

16. These rights are however not those rights that may be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society as encapsulated under **Article 24**. **Article 47** of the Constitution governs the right to fair administrative action, the relevant part of which is worded as follows;

“(1)Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administration action, the person has the right to be given written reasons for the action.”

17. The significance of the provision was expounded in the case of **Dry Associates Limited v Capital Markets Authority and another Nairobi** **Petition No. 328 of 2011 (Unreported)** at paragraph 62, where the court noted as follows;

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”

18. The conduct of the Registrar's office is one that ought to be deprecated. The duty of any statutory body is to serve its constituents with utmost care speed and diligence. The Registrar depones that such party had ceased to exist since they failed to seek registration within a period of 180 days as required of parties earlier registered under the societies Act. That may well be true but the question still begs, why did the office of the Registrar proceed with the initiation of the application processes to the point of receiving application fees and then fail to advance the Petitioners application those reasons? Why did the Respondent proceed to demand and receipt Kshs.100,000.00 as fees for registration of their party and then do nothing for months on end.

19. **Article 232** of the Constitution stipulates the values and principles of public service. The relevant provision of which reads as follows;

“232. (1) The values and principles of public service include—

(a) high standards of professional ethics;

(b) efficient, effective and economic use of resources;

(c) responsive, prompt, effective, impartial and equitable provision of services;

(d) involvement of the people in the process of policy

making;

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate

information;

....” [Emphasis mine]

Even without going into the merits or demerits as to whether the Petitioners' party is qualified to be registered (and not that this is a jurisdiction I am seized of at this stage), I need not emphasize that a reading of the facts in the whole transaction of the attempts by the Petitioners to exercise their constitutional right to form a political party and whose facts remain uncontested point to a great deal of frustration by the Respondent's non responsiveness and prompt provision of its services. This is clearly contrary to the values and principles I have underlined above.

20. I also find to be untenable the Respondent's reliance on the expected enactment of a new law being the Political Parties Act, 2011 to explain the stalemate in the registration of MPM. At paragraph 7 of the Replying Affidavit the 1st Respondent states: *“upon promulgation of the Constitution of Kenya on the 27th of August, 2010, it became apparent that the regulator regime governing the registration and conduct of Political Parties in Kenya, that is the Political Parties Act 2007, would need to be amended so as to comply with the provisions of Article 91 of The Constitution.”*

This proposition is unsustainable. The Respondent seems to be advancing the argument that future possible amendments to the law ought to stall present transaction and that present transactions can be kept at a stand still in anticipation of new law. I am not aware of any such principle of law. If that were to be the case, then the world would come to a stand still in terms of regulation. Applicable law is the law as it is, not what it might be in future. As such, present law and future exigencies cannot be visited on the operation of the present existent law before its repeal. The Respondents have alluded to some policy in that regard but none of that evidence was laid before court. Not that any such evidence would have absolved the Respondents of the responsibility bestowed upon it as a public office nor changed my finding.

I have assessed the arguments of the parties and come to the conclusion that the Petitioner's right to fair administrative action were infringed by the Respondent by failure to promptly and efficiently discharge its mandate.

Reliefs

21. Having established that there was infringement of the right to fair administrative action, the next question is what reliefs should I grant? **Article 23** entitles me to grant an appropriate relief, including an order for compensation and order of judicial review. The relief however ought to be effective. The Court in the case of ***Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248***, elaborated on the duty of the court to grant appropriate relief and expressed itself as follows; *“I have no doubt that this Court has a particular duty to ensure that, within the bounds of the constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach. the values underlying and the right entrenched in the constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the*

courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility and in this regard are obliged to “forge new tools” and shape innovative remedies, if need be, to achieve this goal.”

22. It has been argued by the Respondent that this court cannot grant an order of judicial review as prayed by the Petitioners. To this I have one simple answer; It sure can because of what I have stated above. The House of Lords in **Reg v Inland Revenue Commissioners, Ex-Parte National Federation Of Self Employed And Small Business Ltd (1988) AC 617** held that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. Lord Templeman at pg 862 stated thus;

“Judicial review is available where a decision making authority exceeds its powers commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers.”

23. In framing the appropriate relief, I have also taken note of the need to allow for discretion on the part of state officers in discharge of their mandate as long as this is done in accordance with the law and within the bounds of the values and principles enshrined in our Constitution and particularly **Article 10** as read with **Article 23(3)** of the **Constitution** which provides as follows;

- “1)...
2)...
3)In any proceedings brought under Article 22, a court may grant appropriate relief, including—
- a) a declaration of rights;
 - b) an injunction;
 - c) a conservatory order;
 - d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - e) an order for compensation; and
 - f) an order of judicial review.”

24. In view of the foregoing, I grant the following reliefs:

- i) **I declare that the Petitioners' rights to fair administrative action under Article 47 of the Constitution was violated by the Respondent.**
- ii) **That the Respondent be and is hereby directed to, in accordance with the law and Constitution consider for registration the Petitioner's party, within a period of thirty days from the date of the judgment.**
- iii) **Let each party bear its costs in the circumstances and in view of the orders I have given above.**

25. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Mwangi for Petitioner

No appearance for Respondent

Order

Judgment duly read.

ISAAC LENAOLA
JUDGE